Supreme Court, U. S.
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No. 75-1848

In the Supreme Court of the United States

OCTOBER TERM, 1976

LEROY R. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges his conviction for filing a false affidavit with an agent of the Internal Revenue Service on the ground that the false statements in his affidavit did not contain any "material" facts, within the meaning of 18 U.S.C. 1001.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of submitting a false written statement to the Internal Revenue Service, in violation of 18 U.S.C. 1001. The court sentenced him to a one-year prison term, 60 days of which were to be served, and placed him on probation for the balance of the term (Pet. 4).

1. The pertinent facts are as follows: Petitioner is a lawyer and a member of the Georgia State Senate (Pet.

6-7). During a criminal tax fraud investigation of petitioner, Internal Revenue Service agents met with petitioner on various occasions, and advised him of his constitutional rights three different times. The agent responsible for the investigation thereafter recommended that petitioner be prosecuted for willfully attempting to evade income taxes for the taxable years 1967 through 1970 (Pet. App. 6a).

In October, 1973, two attorneys representing petitioner met with members of the Criminal Tax Section of the Internal Revenue Service Regional Counsel's office. During this conference, one of petitioner's counsel stated that during the taxable years in question, petitioner had received gifts which would explain the discrepancies between his net worth and his reported taxable income. Petitioner's counsel further stated that he wished to produce affidavits from the various donors to identify the amounts and dates of the gifts (Pet. App. 6a).

On November 7, 1973, petitioner met with E. A. Isakson and asked him to submit an affidavit stating that he had made gifts to petitioner in 1969 and 1970 of $5,000, even though Isakson had never made any such gifts. Two weeks after this meeting Isakson told his attorney of petitioner's request. The attorney notified the United States Attorney, who then advised the special agent in charge of the criminal investigation (Pet. App. 6a).

On November 29, 1973, Isakson signed an affidavit furnished to him by petitioner which stated that he had made various cash gifts to petitioner in 1969. Four days later, one of petitioner's counsel delivered the Isakson affidavit and five other affidavits to the Internal Revenue Service Regional Counsel's office. The Regional Counsel

turned these six affidavits over to the Intelligence Division of the Service, which then conducted a supplemental investigation (Pet. App. 6a-7a).

Petitioner was thereafter indicted under 18 U.S.C. 1001 as a result of the submission of the Isakson affidavit (Pet. App. 7a).[1]

2. The decision below is correct and does not warrant further review.[2]

a. Petitioner argues (Pet. 18-19, 21-30) that the false Isakson affidavit could not serve as a basis for his prosecution under 18 U.S.C. 1001 because it was not material to the criminal tax investigation conducted by the Internal Revenue Service. In the context of the statute, materiality means that "the false statement must have a natural tendency to influence, or be capable of affecting or influencing, a government function." *United States* v. *McGough*, 510 F. 2d 598, 602 (C.A. 5), and cases cited therein. However, it is not necessary that the false statement actually influence the government agency. *Gonzales* v. *United States*, 286 F. 2d 118, 122 (C.A. 10), certiorari

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[1]The government withdrew two counts of filing false returns for 1967 and 1968, and petitioner was acquitted of two similar counts for 1969 and 1970 (Pet. App. 7a).

[2]The petition for a writ of certiorari appears to be out of time under Rule 22(2) of the Rules of this Court. The judgment of the court of appeals was entered on April 15, 1976 (Pet. App. 1c-2c). The petition for a writ of certiorari was not filed until June 16, 1976. Although petitioner mailed a petition for rehearing *en banc* to the clerk of the court of appeals on May 9, 1976, the clerk did not file it because it was out of time. Moreover, the clerk's records do not show the receipt of any timely motion for an extension of time to seek rehearing, although the Postal Service claims to have delivered it (Pet. App. 12b-13b). Finally, the court of appeals denied petitioner's motions for recall of the mandate (which had issued on May 7, 1976) and for leave to file a motion for rehearing *en banc* out of time (Pet. App. 14b).

denied, 365 U.S. 878; *Butzman* v. *United States*, 205 F. 2d 343 (C.A. 6), certiorari denied, 346 U.S. 828; *De-Rosier* v. *United States*, 218 F. 2d 420, 423 (C.A. 5). Here, the submission of the false affidavit by petitioner was calculated to persuade the Internal Revenue Service that his case was not appropriate for criminal prosecution, because increases in his net worth in excess of his reported taxable income arose from non-taxable gifts. Cf. *Holland* v. *United States*, 348 U.S. 121, 137-138.[3]

Contrary to petitioner's argument (Pet. 18), the false affidavit was not "submitted long after the crucial decision to prosecute had been made." Although it was submitted after the special agent made the initial recommendation in favor of criminal prosecution, that recommendation was only the first step in the decision-making process. Indeed, petitioner's counsel admitted that his purpose in attending conferences with officials of the Internal Revenue Service at the time he submitted the affidavit early in December, 1973, was to persuade the Service not to refer the case to the Department of Justice for prosecution (II-R. 159), a step which was not taken until January, 1974 (II-R. 5). Petitioner's present claim (Pet. 19) that the affidavit was

[3]*United States* v. *Beer*, 518 F. 2d 168 (C.A. 5), relied upon by petitioner (Pet. 22, 24), does not conflict with the decision below. Apart from the fact that an intra-circuit conflict would not require review by this Court, *Beer* is distinguishable. There, the court held that the defendant's failure to list on an F.D.I.C. questionnaire a loan to which he was accommodated was not a "material" false statement under 18 U.S.C. 1001, where the loan was repaid within a few weeks after the submission of the questionnaire, the bank suffered no loss, and the omission did not affect any decision of the F.D.I.C.

Moreover, contrary to petitioner's further argument (Pet. 18-19), the fact that the Internal Revenue Service may have had evidence of the falsity of the affidavit when it was submitted does not foreclose prosecution under 18 U.S.C. 1001. See *Brandow* v. *United States*, 268 F. 2d 559, 565 (C.A. 9).

a "worthless statement" stands in sharp contrast to his position at trial that the affidavit was true (III-R. 81).[4]

b. Finally, petitioner argues (Pet. 15-18, 20) that his conviction is inconsistent with *Bronston* v. *United States*, 409 U.S. 352. There, the Court reversed a perjury conviction under 18 U.S.C. 1621, on the ground that the defendant did not falsely swear that he had never had any Swiss bank accounts. Although his testimony was evasive (see 409 U.S. at 354), it was not false and the Court therefore concluded that he was not guilty of the crime of perjury. Here, however, the falsity of the Isakson affidavit submitted by petitioner was clear and unequivocal. *Bronston* therefore has no application to this case.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4]Petitioner not only urged that the affidavits, including that of Isakson, were true and correct, but they were used by the defense expert in purporting to account for the increases in petitioner's net worth (III-R. 81; VIII-R. 80-87).

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